

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

CARNIVAL CARTING, INC.

And

**Case Nos. 29-CA-20586
29-CA-22552**

**LOCAL 813, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

Kathy Drew King, Esq., Counsel for the General Counsel.

SUPPLEMENTAL DECISION

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on January 11, 2006 in Brooklyn, New York. The Compliance Specification and Notice of Hearing herein issued on April 28, 2005¹ alleging the backpay and medical expenses due to discriminate Frank Mendez as well as the Pension Fund and Severance Plan contributions due to Local 813, International Brotherhood of Teamsters. By letter dated May 24, the Board's regional office notified the Respondent that no answer to the Compliance Specification had been received, and that unless an answer was filed by June 7, a motion for summary judgment would be filed. The Respondent filed an answer on June 7 generally denying the allegations contained in the Compliance Specification. Arguing that the Respondent's answer failed to comply with the specificity requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations, the General Counsel filed with the Board a Motion for Partial Summary Judgment. On September 20, 2005, the Board (at 345 NLRB No. 63) issued a Supplemental Decision and Order ruling that the Respondent's Answer to certain of the allegations contained in the Compliance Specification did not comply with the requirements contained in Section 102.56(b) and (c) of the Board's Rules and Regulations, and therefore Paragraphs I, II, VII and VIII of the Compliance Specification are deemed to be admitted, and therefore the only issues that could be litigated at the hearing are Interim Earnings (Paragraph III), Expenses (Paragraph IV), Net Backpay (Paragraph V), and Medical Expenses (Paragraph VI).

I. The Facts and Analysis

A. Interim Earnings

The backpay period began on December 15, 1996, the date of Mendez' unlawful discharge by the Respondent and continues in the absence of a valid offer of reinstatement. Although the Respondent has not yet made an offer of reinstatement to Mendez, Counsel for General Counsel states that effective October 1, 2004 Mendez took himself out of the job market and, therefore, unless and until he returns to the job market, his backpay ends on October 1, 2004.

Mendez' first jobs during the backpay period were with Glendale Awnings in Glendale, New York and Northern Auto Repairs, beginning on about December 30, 1996 and ending on about May 31, 1997, earning \$8.00 an hour. For the period June 1, 1997 through September 30,

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2005.

1997 he was employed by Carnel Awnings in Glendale, New York and Accurate Windows in Forest Hills, New York at an hourly wage rate of \$10.00. From October 1, 1997 through December 31, 1997 he was employed by Clearview Remodeling in Plainview, New York at an hourly wage rate of \$8.00. His next job, from January 1, 1998 through March 31, 1998 was with Storm Aluminum Corp., of Long Island City, New York, at \$8.00 an hour. His next position was as a plumber's assistant [working for his father] in Asbury Park, New Jersey at \$8.00 an hour. This job lasted from April 1, 1998 through October 31, 1999. His final job during the backpay period was with Marlande Heating Corp. Bronx, New York where his hourly wage rate began at \$10.00 an hour and ended at \$13.00 an hour. That job began on November 1, 1999 and ended on October 1, 2004, when he left the job market.

In a Compliance Specification, "...the sole burden on the General Counsel is to show the gross amounts of backpay due- the amount the employees would have received but for the employer's illegal conduct." *La Favorita, Inc.*, 313 NLRB 902 (1994). Once this has been established, it is the employer's burden to establish defenses to mitigate its backpay liability by seeking to establish, for example, the willful loss of earnings and interim earnings to be deducted from the gross backpay. *Basin Frozen Foods, Inc.*, 320 NLRB 1072 (1996). A discriminatee is required to make reasonable efforts to secure interim employment and the burden is on the employer to establish that the discriminatee failed to do so. Respondent did not appear at the hearing herein, but even if it had, I fail to see how it could have sustained this burden. Mendez secured interim employment within a week or two of his termination and, apparently, worked continuously for almost eight years before leaving the job market on October 1, 2004 and stopping the backpay clock. I therefore find that Mendez' interim earnings are as set forth in the amended Appendix A attached to the Compliance Specification.

The only interim expense deducted from his interim earnings was the amount of \$1,149.20 representing the additional cost of traveling from his home to his interim employment at Clearview Remodeling, in Plainview, New York for the period October 1, 1997 through December 31, 1997. He had previously traveled two miles roundtrip each day during his employment with Respondent. His interim employment at Clearview required an additional fifty two miles per day at 34 cents a mile, for a total of \$1,149.20. This amount was properly deducted from Mendez' interim earnings to determine the net backpay. *Aircraft & Helicopter Leasing and Sales*, 227 NLRB 644 (1976); *Rikal West, Inc.*, 274 NLRB 1136, 1139 (1985).

B. Medical Expenses

During Mendez' employment with the Respondent he was covered by the health and dental insurance policies that were available to the Respondent's unit employees. During his interim employment with Marlande Heating Corp. from about November 1, 1999 through October 1, 2004, Mendez had out-of-pocket expenses of \$20.00 a week for health insurance, for a total of \$4,740. He is entitled to be reimbursed by Respondent for this expense. *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1618 (2001).

C. Calculations of Amounts Owed

The gross backpay, is deemed admitted by the Board's Supplemental Decision. I have found that Mendez' interim earnings are properly set forth in Appendix A, and that the \$1,149.20 travel expense incurred in the fourth quarter of 1997 is a proper deduction from these interim earnings. Therefore the net backpay up to October 1, 2004 is \$100,829.98. The medical expenses referred to above totaled \$4,740 bringing that total amount of backpay that is owed to

Mendez \$105,569.98, plus interest.² The amounts due to the Union's Pension Fund and Severance Plan, also deemed admitted by the Board's Supplemental Decision, are \$15,795 and \$6,480 respectively.

5 On these findings of fact, conclusions of law and on the entire record, I issue the following recommended³

ORDER

10 The Respondent, Carnival Carting, Inc., its officers, agents, successors and assigns, shall offer reinstatement to Frank Mendez, pay him the amount of \$105,569.98, plus interest representing his net backpay as well as his medical expenses. They shall also pay to the Union the sums of \$15,795 and \$6,480, plus interest, to reimburse its Pension Fund and Severance Plan.

15 **Dated, Washington, D.C., January 25, 2006.**

20

Joel P. Biblowitz
Administrative Law Judge

25

30

35

40

45 ² If, and when, Mendez decides to reenter the job market, he shall notify the Respondent and the Board of this intention, in writing, and the backpay period will resume upon the Respondent's receipt of that letter, absent an earlier unconditional offer of reinstatement by the Respondent to Mendez.

50 ³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.